

UT 14-01

Tax Type: Use Tax

Tax Issue: Sales v. Resale Issues

**Illinois Department of Revenue
OFFICE OF ADMINISTRATIVE HEARINGS**

James R. Thompson Center
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**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

ABC BUSINESS,

TAXPAYER

No. XXXX

NTL: XXXX

Account ID: XXXX

**Kenneth J. Galvin
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. John Doe, *pro se*, on behalf of ABC Business, Mr. Marc Muchin, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis: On July 19, 2011, the Illinois Department of Revenue (“Department”) issued the Notice of Tax Liability (“NTL”), captioned above, to ABC Business (“ABC Business”) for use tax on purchases made September 26, 2008. ABC Business’s request for a late discretionary hearing was granted and an evidentiary hearing was held on October 17, 2013. At the hearing, ABC Business argued that they did not owe use tax on the purchases because the items were purchased for resale. Following a review of the Department’s evidence, it is recommended that the Notice of Tax Liability be finalized as issued. In support thereof, the following “Findings of Fact” and “Conclusions of Law” are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the Notice of Tax Liability, dated July 19, 2011, captioned above, as adjusted by the "SC-10-V, Audit Correction and/or Determination of Tax Due." Tr. pp. 5-7; Dept. Ex. Nos. 1 and 2.
2. ABC Business did not have an active registration number or a resale number with the Department during the period covered by the NTL. Tr. pp. 12, 15-16.
3. ABC Business offered into evidence four "jewelry purchase orders" from "XYZ Business." The "order dates" on the purchase orders, March 5, 2008, two dated May 28, 2008 and August 22, 2008, predate the audit period "date of purchase" of September 26, 2008. Taxpayer's Ex. No. 1.

Conclusions of Law:

Under the Use Tax Act ("Act") (35 ILCS 105/1 *et seq.*), Illinois imposes a tax upon the privilege of using in Illinois tangible personal property "purchased at retail" from a retailer. 35 ILCS 105/3. Under the "Definitions" section of the Act, the term "purchase at retail" means "the acquisition of the ownership of or title to tangible personal property through a sale at retail." 35 ILCS 105/2. The definition of the term "sale at retail" includes the following: "'Sale at retail' includes any such transfer made for resale unless made in compliance with Section 2c of the Retailers' Occupation Tax Act, as incorporated by reference into Section 12 of this Act." *Id.*

Section 2c of the Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*) provides, in relevant part, as follows:

If the purchaser is not registered with the Department as a taxpayer, but claims to be a reseller of the tangible personal property in such a way that such resales are not taxable under this Act or under some other tax law which the Department may administer, such purchaser ... shall apply to the Department for a resale number. ...

Upon approval of the application, the Department shall assign a resale number to the applicant and shall certify such number to him. ...

Except as provided hereinabove in this Section, a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. *This presumption may be rebutted by other evidence that all of the seller's sales are sale [sic] for resale, or that a particular sale is a sale for resale.* Emphasis added; 35 ILCS 120/2c.

Section 12 of the Act also incorporates by reference section 5 of the ROTA, which provides that if the taxpayer fails to file a return, the Department shall determine the amount of tax due “according to its best judgment and information.” 35 ILCS 105/12; 120/5. A certified copy of the Department’s determination of the amount of tax due “shall, without further proof, be admitted into evidence... and shall be *prima facie* proof of the correctness of the amount of tax due, as shown therein.” *Id.* Once the Department has established its *prima facie* case by submitting the certified copy of the Department’s determination into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987). To prove his or her case, a taxpayer must present more than testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient documentary evidence to support his or her claim. *Id.*; Balla v. Department of Revenue, 96 Ill. App. 3d 293, 295 (1st Dist. 1981).

In the instant matter, the taxpayer has not presented sufficient documentary evidence to show that when they purchased the items, the purchase was not a “purchase at retail” because the items were purchased for resale in accordance with section 2c of the ROTA. Under section 2c, if the purchaser is not registered with the Department as a taxpayer, then the purchaser must apply to the Department for a resale number. Mr. John Doe testified that ABC Business did not have an

active registration number or a resale number with the Department during the period covered by the NTL. Tr. p. 12. Mr. James Barborka, Revenue Auditor for the Department, testified that ABC Business did not have a resale number and was not registered with the Department during the period covered by the NTL. Tr. pp. 15-16. Under section 2c, the failure to present an active registration number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. 35 ILCS 120/2c.

This presumption may be rebutted by other evidence that the sales were for resale. An example of the other evidence that might be used to document that a sale is for resale is provided in the Department's regulations. The regulation indicates that an invoice from the purchaser to his customer showing that the item was actually resold could be evidence that the sale was for resale. See 86 Ill. Admin. Code §130.1405(d). ABC Business caused to be admitted into evidence four "jewelry purchase orders" from "XYZ Business." The "order dates" on the purchase orders, March 5, 2008, two dated May 28, 2008 and August 22, 2008, predate the audit period "date of purchase" of September 26, 2008. Taxpayer's Ex. No. 1. There is no evidence in the record tying the XYZ Business purchase orders to the items purchased by ABC Business on September 26, 2008. I am unable to conclude from the evidence that the items purchased by ABC Business on September 26, 2008, were "actually resold" by XYZ Business. Furthermore, there is no testimony or documentary evidence in the record that the items purchased by ABC Business on September 26, 2008 were "actually resold" by any other retailer. The taxpayers, therefore, have not presented sufficient evidence to overcome the Department's *prima facie* case.

Recommendation:

For the foregoing reasons, it is recommended that the Notice of Tax Liability be finalized as issued.

May 9, 2014

Kenneth J. Galvin,
Administrative Law Judge